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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THREAD COLLECTIVE, INC., Plaintiff, Cross-defendant and Appellant, v. PIXIOR, LLC, Cross-complainant and Appellant, YASSINE AMALLAL, Cross-defendant and Respondent.	B285562 (Los Angeles County Super. Ct. No. BC601205)

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed in part and reversed in part.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Craig Holden, Jeffry A. Miller, and Dennis Holahan, for Plaintiff, Cross-defendant and Appellant.

Browne George Ross, Peter W. Ross and Charles Avrith, for Cross-complainant and Appellant and Cross-defendant and Respondent.

After a jury returned a civil verdict largely in favor of plaintiff Thread Collective, Inc. (Thread), defendant Pixior, LLC (Pixior) and its owner Yassine Amallal[1] (collectively, defendants) filed motions for judgment notwithstanding the verdict and for a new trial. The trial court granted the judgment notwithstanding the verdict motion as to Thread's fraud cause of action and partially granted the motion for new trial as to one subcategory of breach of contract damages awarded by the jury. Pixior's appeal and Thread's cross-appeal principally ask us to decide whether the contract in question was ambiguous such that the jury could consider extrinsic evidence on its meaning, and whether the evidence presented was sufficient to support the damages awarded. We also consider whether the trial court correctly concluded there was no substantial evidence supporting the jury's fraud finding on a concealment or intentional misrepresentation theory.

I. BACKGROUND

A. Thread Collective and Pixior

Thread is an apparel manufacturer. Pixior is a third-party logistics company that provides warehousing, distribution, and e-commerce fulfillment services for apparel companies. Generally, third-party logistics providers accept shipments of a manufacturer's goods, store them in a warehouse, and ship them out at the direction of the manufacturer.

In October 2014, Thread and Pixior entered into a contract for Pixior to provide Thread with third-party logistics services.

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[1] Amallal is a cross-respondent, but not an appellant, in this appeal.

The relationship soon soured, and by December 2015, Thread moved all of its merchandise out of Pixior's warehouse.

Thread filed a complaint against Pixior and Amallal in November 2015 and a first amended complaint (the operative complaint) the following month. The operative complaint alleged eight causes of action against Pixior: breach of contract; declaratory relief; conversion; breach of the covenant of good faith and fair dealing; intentional interference with business relations; fraud; unfair, fraudulent, and illegal business practices; and injunctive relief. Pixior, in turn, filed a cross-complaint against Thread and Sophia Metaxes, its Chief Financial Officer and Chief Operating Officer, alleging two causes of action for fraud and one for breach of contract. The parties proceeded to a jury trial in March 2017.

B. The Evidence at Trial

In 2014, Thread was shopping for third-party logistics companies. Kumar Gheewala, who was Thread's Logistics Manager at the time, negotiated with James Burley, Pixior's Vice President of Sales. Early in the negotiations, Gheewala emailed Burley a chart depicting Thread's warehouse processing projections for the year. The chart projected 825,229 boxes, in 1,400 containers, would be shipped to the West Coast. Gheewala's email noted the projections could vary based on business.

Burley responded by sending Gheewala a proposal "[b]ased on [Gheewala's] projections" in early June. The proposal, which was structured in the form of a draft agreement, offered to provide Thread with "Unload & Stage Handling In/Out per Master Case" ("In/Out" services) at $0.54 and "Storage per

Master Carton" at $0.09, with the storage price to be billed at "End of Month." In other words, Pixior would charge Thread $0.54 per "Master Case," or box, to receive, process, and send out boxes of Thread's merchandise, and would charge $0.09 per month "per Master Carton," or box, to store each box. Burley later sent Gheewala a revised draft agreement that similarly priced the In/Out and storage rates per box.

In August 2014, Gheewala and Metaxes visited Pixior locations in Southern California. Following the in-person meeting, Burley sent Thread another revised draft of a proposed logistics agreement. The revised draft again stated In/Out services would be charged "per Master Case" and the storage price would be charged "Per Master Carton."

In late September 2014, the third-party logistics company Thread had previously been using went bankrupt and Thread decided to use Pixior for logistics. Prior to the move, Burley told Thread that Pixior would pay for "the freight" to move Thread's merchandise to Pixior's warehouse.

In early October, Burley signed a three-page logistics agreement on Pixior's behalf and emailed Metaxes the agreement for her signature. Unlike the prior drafts, this agreement stated Pixior would provide handling services at $0.54 "per Master Case per cu/ft"—the addition of the "per cu/ft" language being the key difference. It also provided storage would be provided at $0.09 to be billed "End of Month/Cu-Ft."[2] The agreement emailed to

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[2] Burley testified he added the "per cubic foot" language to the agreement, which he said he, Amallal, and Metaxes had all discussed during the in-person meeting in August 2014. According to Burley, Metaxes said she preferred a per box rate, but he and the other Pixior representatives explained Pixior

Metaxes also included provisions stating bills would be "due and payable within 10 days of invoice," the contract and all pricing would have a two year term, and "Pricing [was] based on account profile." It did not contain an exclusivity provision or, at least according to Metaxes, attach the referenced account profile.[3]

Metaxes signed the emailed agreement and returned it to Pixior. She read the contract before signing it and made changes to certain pricing terms, but she said she did not notice the addition of the "per cu/ft" language.

Multiple witnesses at trial testified the terms "per Master Case" and "per cu/ft" were contradictory. Metaxes, for instance, was asked whether it was possible to be billed per master case per cubic foot, and she denied that it was, stating you either had to bill per cubic foot or per master case and "you have to decide which one you want." Alen Brandman, Thread's owner, testified it was inconsistent to have both per master case and per cubic foot in the same contract.[4] On Pixior's side, Burley agreed billing

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needed to charge by cubic foot. Metaxes denied meeting with Amallal during that August 2014 visit and maintained the parties had always discussed a per box rate with no discussion of charging per cubic foot.

[3] After this litigation commenced, Pixior took the position that its contract with Thread incorporated an account profile attached at the end of the signed three-page agreement. Specifically, Amallal submitted a declaration attaching a four page version of the contract, and Burley testified he generated the account profile based on Gheewala's projections and the profile was an "integral part of the contract."

[4] Frank Navarro, Pixior's Operations Manager who previously worked for Universal Logistics and Arm Logistics

on a per-box basis was different than billing on a per-cubic-foot basis, and when asked on cross-examination whether it was inconsistent to set pricing on both a per-box and a per-cubic-foot basis, Burley replied "Yeah, I mean, the box is the description or the commodity, and the cubic feet is the price. Yeah, I understand what you're saying."

Thread did not realize the cubic foot change in the pricing term had been made until it received its first bill from Pixior, which charged Thread per cubic foot of merchandise. Gheewala emailed Metaxes to advise they "ha[d] a problem with the Pixior agreement" because Pixior was "charging 54 cents per cube instead of box," and "[a]s per agreed with [Burley] it was supposed to be 54 cents per box . . . ." Thread's average box size was between one and a half to two cubic feet, which meant the per cubic foot price "essentially almost doubled" the rate to $1.08 per box.

Metaxes called Amallal to discuss what she called a "bait and switch." Around the same time, Burley sent Metaxes an email conceding he had "said that [Pixior] would pay for the freight from [Thread's] old facility to [Pixior]," but nevertheless taking the position that Thread would need to pay or reimburse Pixior for "any expenses" incurred in the move because it was "NOT fair and reasonable to believe we would incur such charges under these circumstances." Pixior sent Thread invoices for

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(other third-party logistics companies), testified Universal charged Thread a per box rate and Arm Logistics had discussed per box prices with Thread.

trucking and labor charges, and Gheewala testified Thread paid Pixior $130,000 in transportation costs.[5]

Though the principals at Thread were unhappy, the company paid Pixior the per cubic foot price and continued the relationship. Over the course of its dealings with Pixior, Thread paid $156,000 more because Pixior charged it per cubic foot rather than per box for In/Out services and $67,000 more in storage charges. Thread also became unhappy with many aspects of the service Pixior provided, including the location where Thread's goods were stored: Thread expected its products would be housed in Pixior's South Gate facility, but most were placed in Pixior's Rancho Cucamonga warehouse.

In May 2015, Thread entered into a contract with another third-party logistics company, Santa Fe Warehouse, Inc. Approximately two months later, Burley submitted a new draft contract to Thread that omitted the "cubic foot verbiage" in an attempt to generate more business from Thread. Around the same time, Pixior learned Thread had also begun working with Santa Fe.

Amallal sent Metaxes an email stating Thread had breached their contract by sending business to a different third-

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[5] A payment schedule depicting the payments made by Thread to Pixior over the course of their business relationship was admitted at trial. Eight of the line items billed in October 2014 are described as being related to either "MOVE LABOUR CHARGES + Overtime" or "MOVE Freight IN." Those eight items total $72,880. A $16,400 line item charged as part of a warehouse lien in October 2015 also represents it was for "Charge back moving Trailers." Together, these items total $89,280.

party logistics company. Metaxes disagreed in reply emails, writing there were no guaranteed minimums or exclusivity provisions in the contract. Thus, while Thread continued to deliver merchandise to Pixior, Thread "lowered" the work "to see what they were going to do."

In October, Amallal advised Metaxes that Pixior intended to "rerate" the agreement because its pricing was based on "the volume [Thread] promised for 2 years." Early the next month, Pixior converted Thread's account to require payment of charges in cash before delivery of any merchandise. Pixior also stated it wanted to be reimbursed for the money it had paid to move Thread's goods into Pixior's warehouse (i.e., an additional amount Pixior had not yet demanded Thread reimburse), and that it would no longer apply the "discount rate" to Thread's account.

Later invoices delivered to Thread from Pixior stated the In/Out services rate was doubled to $1.08 per cubic foot because Thread breached the contract. Others retroactively "rated up" Thread's storage rate to $0.18 per cubic foot (from $0.09 per cubic foot) "because your account [breached] the contract" and charged Thread the difference between the rate paid and the new rate from January 2015 through October 2015.

On November 10, 2015, Pixior sent Thread its "final invoice" in response to Thread's request to move all of its merchandise out of Pixior's warehouse. The same day, Pixior informed Thread it had placed a warehouse lien on Thread's goods. The lien represented the amount due was $146,768.65, and that amount was attributed to "[p]ast due invoices" from

October 30, 2015, to November 10, 2015.[6] The lien also stated the total due after an auction would be $170,008.65. In addition to the warehouse lien, Metaxes testified Amallal "also hit [Thread] with $15,000 of extra bills."

Metaxes did not consider the invoices supporting the lien to be valid, did not think they allowed a lien, and characterized the lien as being supported by "fake bills." But Thread paid the total amount of the lien under protest while also filing the complaint in this matter and seeking a preliminary injunction to prevent the "false lien" from authorizing Pixior to sell Thread's property.

Thread thereafter moved all its merchandise from Pixior's warehouse to Santa Fe's warehouse in December 2015. Metaxes testified Santa Fe charged Thread $0.65 per box.[7] Metaxes also testified she paid $158,000 more at Santa Fe through October 2016 than she would have under her understanding of the agreed-upon terms with Pixior (i.e., without the per cubic foot rate). Thread was still doing business with Santa Fe and other third-party logistics companies in Los Angeles at the time of trial.

C. Thread's Closing Argument Damage Calculations

During closing argument, Thread specified three categories of damages it was seeking: increased rates, overcharges, and

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[6] An accompanying statement listed five allegedly past due invoices, four of which were dated October 30, 2014, and due on November 14, 2015, and a fifth dated November 10, 2015, that was purportedly due that same day.

[7] For reasons that are not clear, damages calculations were later made using a rate one penny less, i.e., at $0.64 per box.

missing merchandise. Counsel for Thread depicted this on a damage summary chart that was not admitted into evidence.

As we describe in further detail *post*, the damages for increased rates, which Thread represented totaled $383,316.71, were itemized as $158,316.71 for overpaid contract rates per cubic foot, $158,000 in overpaid rates for the move to the Santa Fe warehouse, and $67,000 in overpaid storage rates. The damages as calculated by Thread for overcharges totaled $265,196.35. That figure was comprised of $170,008.35 for the assertedly improper warehouse lien, $15,000 in additional overcharges, and $80,188 in freight from its previous third-party logistics company to Pixior.

D. Jury Verdict and Punitive Damages

The jury found Pixior liable on Thread's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.[8] The jury awarded damages to Thread in amounts identical to the amounts cited by Thread in closing argument: $265,196.35 for overcharges and $383.316.71 in increased rates. The jury did not award Thread any damages for missing merchandise.

The jury also returned a verdict for Thread on its fraud causes of action against Pixior and Amallal. The jury awarded no damages against Pixior on the fraud claim, but awarded Thread $170,633.71 in fraud damages as against Amallal. The jury further found Thread had proven by clear and convincing

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[8] Prior to submission of the case to the jury, the trial court granted Pixior's motion for nonsuit on other claims not germane to this appeal.

evidence that Pixior and Amallal had acted with malice, oppression, or fraud—a finding that led to an award of just over $170,000 in punitive damages.

E. Posttrial Motions

In June 2017, defendants Pixior and Amallal filed a motion for judgment notwithstanding the verdict on Thread's fraud and punitive damages claims, plus a motion for new trial on damages. Among other things, Pixior's new trial motion argued the increased rates and overcharges damages were excessive and unsupported.[9] Thread opposed both motions.

The trial court granted defendants' motion for judgment notwithstanding the verdict as to the fraud cause of action and punitive damages. It found there was insufficient evidence defendants misrepresented or concealed a material fact, or that Thread reasonably relied on any misrepresentation or concealment in connection with the warehouse lien.

As for defendants' motion for new trial on excessive damages, the trial court granted it in part. The court denied the motion for new trial on the increased rates damages because it

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[9] Pixior detailed the amounts that comprised the portion of the overcharges damages attributable to the warehouse lien. According to Pixior, the lien total was the sum of past due invoices (totaling $146,768.75), prospective storage charges through the date of a potential auction ($12,000), and expected auction sales costs and fees ($11,240). Pixior also specified how the past due invoices were calculated. Its calculations, which Thread did not contest below, included $16,400 for "charge back moving trailers because of breaking the contract-reimbursement paid by Pixior."

believed the contract was ambiguous and reasonably susceptible to the jury's interpretation, it was not persuaded by Pixior's other legal arguments, and it found substantial evidence supported the award. The court did, however, partially agree with defendants' contentions regarding the overcharges damages. Specifically, the court agreed with defendants' contentions regarding the $170,008.35 in warehouse lien damages because Pixior would have been entitled to certain aspects of the lien amount based on the contract even as interpreted by Thread. The court accordingly granted a new trial on the limited issue of the appropriate damages arising from the $170,008.65 warehouse lien.

The parties now cross-appeal from the posttrial rulings. Pixior challenges the trial court's partial denial of the new trial motion. Thread challenges the trial court's decision to partially grant the new trial motion, and its decision to grant the motion for judgment notwithstanding the verdict on the fraud claims.

II. DISCUSSION

We hold the trial court's rulings are largely but not quite entirely correct. As to defendants' motion for judgment notwithstanding the verdict, we agree with the trial court that there was insufficient evidence to sustain a finding that Thread relied to its detriment on an intentional misrepresentation or concealment of a material fact. That requires judgment for defendants on the fraud claims as well as elimination of the punitive damages award against defendants, which is dependent on a viable finding of fraud.

With regard to defendants' motion for new trial, there are more issues for resolution. Defendants argue the damages due to

increased rates for In/Out services charges were excessive, but the trial court rightly rejected this argument. Specifically, the jury was entitled to find the contract's language as to those charges reasonably susceptible of more than one meaning and conclude the parties' agreement was for rates to be calculated on a per box rather than per cubic foot basis. The same cannot be said, however, as to the damages attributable to increased *storage* rates—there is no similar ambiguity in that contract term and the trial court therefore should have granted the new trial motion in that respect because the jury could not find a breach of the contract as to the storage rate. The remainder of the trial court's new trial motion findings, however, are unassailable. Defendants were entitled to a new trial on the warehouse lien damages because the contract authorized at least some of the amounts Pixior charged, but the rest of defendants' substantial evidence challenges to the overcharges damages fail.

A. Judgment Notwithstanding the Verdict

"'A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.'" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.) "'In passing upon the propriety of a judgment notwithstanding the verdict, appellate courts view the evidence in the light most favorable to the party who obtained the verdict and against the party to whom the judgment notwithstanding the verdict was awarded. [Citations.] In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment.'

[Citation.]" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 227.)

For Thread to prevail on appeal of the order granting the motion notwithstanding the verdict, "the record must contain sufficient evidence to support a finding in its favor on each and every element which the law requires to support recovery. [Citation.] No matter how overwhelming the proof of some elements of a cause of action, a plaintiff is not entitled to a judgment unless there is sufficient evidence to support all of the requisite elements of the cause of action." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.)

The jury found for Thread and against Pixior and Amallal on Thread's fraud cause of action, but its verdict did not specify whether the jury found an intentional misrepresentation or concealment. Because the jury was instructed on both theories, judgment notwithstanding the verdict is only appropriate if no substantial evidence supports the verdict under either theory.

Thread advances two theories of fraud on appeal. First, Thread contends there is substantial evidence of fraudulent concealment because Pixior concealed its claim that the contract between the parties consisted of four, rather than three, pages. Second, Thread contends there is substantial evidence of intentional misrepresentation based on the warehouse lien. We conclude there is insufficient evidence to support a fraud verdict under either theory.

"The required elements for fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or

suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact." (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606.) There is no substantial evidence of either a *fact* Pixior failed to disclose or that Thread relied to its detriment on its unawareness of such a fact.

Pixior's claim that the customer profile—the asserted fourth page—was a part of the contract is not a "fact" concealed from or misrepresented to Thread. The existence of the customer profile, alone, has no significance. It is only significant if it was part of the contract. Pixior's claim was a contention Thread was entitled to refute, not a fact. More to the point, based on the jury's verdict, it is a contention Thread successfully refuted. Additionally, Thread points to no evidence in the record establishing it would have behaved differently if it had known Pixior contended there was a fourth page to the agreement. Indeed, Thread's only support for this point is the assertion it would "obviously have acted differently." This conclusory assertion is not evidence sufficient to support the jury's verdict.

Turning to intentional misrepresentation, the elements of that cause of action are "(1) false representation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 353.) Thread similarly failed to demonstrate reliance on an allegedly fraudulent misrepresentation related to the warehouse lien. Though Thread contends on appeal that it "believed that the lien might be valid and enforceable," it cites no evidence supporting its assertion.

The testimony at trial indicates Thread did not, in fact, believe the warehouse lien was valid, and instead paid the lien under protest only to secure its property. Metaxes, for instance, testified she did not consider the invoices supporting the lien to be valid invoices that would even allow a lien and characterized the lien as being supported by "fake bills." With no evidence of reliance, the trial court correctly granted judgment for defendants on the intentional misrepresentation claim. And absent a valid fraud claim, the punitive damages award falls away too.[10]

B. Motion for New Trial

A verdict may be vacated and a new trial granted on a party's motion on certain grounds "materially affecting the substantial rights" of the party, including "[e]xcessive or inadequate damages," "[i]nsufficiency of the evidence to justify the verdict or other decision, or [because] the verdict or other decision is against law." (Code Civ. Proc., § 657.) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (§ 657.) On a motion for new trial claiming excessive damages or insufficient evidence (§ 657, subds. 5-6), the trial court sits as an

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[10] Because we affirm the trial court's order on these grounds, we need not address Pixior's remaining arguments in favor of affirmance.

independent trier of fact. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*).) We review a trial court's determination of a motion for a new trial for abuse of discretion, and analyze "any determination underlying any order . . . under the test appropriate to such determination." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.)

1. The trial court's denial of the new trial motion as to increased rates damages

"The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506; accord, *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067.) When a trial court denies a motion for new trial, "we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) We "review the jury's damages award for substantial evidence, giving due deference to the jury's verdict and the trial court's denial of the new trial motion. [Citations.]" (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300.)

The jury awarded Thread $383,316.71 in increased rates damages, the exact amount Thread requested during closing argument. Both the parties and the trial court assume the jury's damages awards were based on the sum of the subdivided amounts Thread requested in closing argument. Pixior contends these increased rates damages are not recoverable because the plain language of the contract states the rates are per cubic foot, Thread's operative complaint admitted the contract's rates were

per cubic foot, the operative complaint does not allege claims or damages based on the per cubic foot pricing, and substantial evidence does not support the awards.

a. the jury was entitled to find the agreement as to In/Out service charges was per box

"Damages awarded to an injured party for breach of contract 'seek to approximate the agreed-upon performance.' [Citation.] The goal is to put the plaintiff 'in as good a position as he or she would have occupied' if the defendant had not breached the contract. [Citation.] In other words, the plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's contractual bargain." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 967-968.) "The injured party's damages cannot, however, exceed what it would have received if the contract had been fully performed on both sides. (Civ. Code, § 3358.)" (*Id.* at p. 968.) Thus, the jury's award of increased rates damages is only proper if the claimed damages are, in fact, equivalent to the benefit of the contractual bargain. The answer to this question depends on the interpretation of the contract.

The executed contract between Thread and Pixior provided Pixior would charge $0.54 for "Unload & Stage Handling In/Out per Master Case per cu/ft." It also provided Pixior would charge $0.09 for "Storage" at "End of Month/Cu-Ft." Thread's theory regarding its damages, as articulated during closing argument, was that it was entitled to (1) $158,316.71 in damages due to Pixior "adding the language" that doubled the In/Out services rate by charging per cubic foot rather than per box, (2) $158,000 in damages due to having to pay Santa Fe $0.64 per box when it

left Pixior, which was $0.10 more per box than the $0.54 per box rate, and (3) $67,000 in overpaid storage rates that were "double the amount." As the trial court found, Thread's damage calculations "presume[ ] the contract calls for payment per master case, rather than per cubic foot."

The plain language of the agreement, which sets the In/Out services rate "per Master Case per cu/ft" is readily susceptible to more than one interpretation. Metaxes and Brandman testified the terms "per Master Case" and "per cubic foot" were inconsistent. Even Burley effectively acknowledged the terms were inconsistent with each other. In addition to the ambiguity revealed by the inconsistency, the jury was presented with conflicting testimony about the discussions that led to the contract. Thread's representatives testified they only discussed being charged per box and understood that was how they would be charged, while Pixior's representatives testified they had discussed charging per cubic foot. In light of the contract's ambiguity, the testimony regarding contract term usage within the industry, and the parties' inconsistent testimony regarding their understanding of the bargain they struck, the jury was entitled to weigh the evidence presented, interpret the contract, and award damages based on the In/Out services rate of $0.54 per box. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [where "ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury"].) This, of course, means Thread's damages can include the additional ten cents per box

Thread paid Santa Fe after Pixior reneged on the agreed-upon In/Out services rate.

The same interpretive analysis does not hold, however, with respect to the awarded increased rates damages for storage charges. Thread's theory is that it was entitled to damages because Pixior doubled the storage rate just like it doubled the In/Out services rate. But the language in the contract for the two rates was not identical. The storage provision, which Thread does not specifically address in its briefing, states the $0.09 rate is to be charged "End of Month/ Cu-Ft." Because this plainly provides storage rates were to be charged per cubic foot, there was no ambiguity for the jury to interpret and the trial court abused its discretion by not granting a new trial for a redetermination of damages, if any, for overpaid storage rates.[11]

b. None of Pixior's remaining arguments regarding increased rates damages require reversal

Pixior's remaining arguments attacking the increased rates damages are unavailing. First, Pixior contends Thread is bound by a purported judicial admission in its complaint that "[a]t the last minute before the Agreement was signed, Defendant added 'per cu/ft' immediately after 'per Master Case' to the first line of the charge list on the first page of the Agreement, thereby

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[11] We remand for a new trial on this issue because we cannot rule out the possibility that Thread would be able to prove some measure of storage-related damages. We express no opinion, however, as to whether the remand for a new trial on this point will necessarily require a jury determination.

changing the charge per box for in/out handling from $0.54 to approximately $1.00 per box, and thereby almost doubling the price for this basic service for every shipment received by Defendant and sent out by Pixior." "[J]udicial admissions[, however,] involve facts, not legal theories or conclusions." (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 384 ["Legal conclusions and assertions involving a mixed question of law and fact are not the stuff of judicial admissions"].) Thread's allegations admit the existence of the contract and its terms, but the contract's interpretation is not a fact that may be admitted.

The authority Pixior cites to argue the contrary (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118 (*Food Safety*); *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234 (*St. Paul Mercury*)) does not support its point. In *Food Safety*, the cross-complainant alleged a contract between it and the cross-defendant contained written terms that were attached to the cross-complaint. Those terms included a limitation of liability clause. The court held the allegation was a binding admission that the limitation of liability clause was part of the contract, but it did not construe the allegation as an admission how the contract term should be interpreted. (*Food Safety*, *supra*, at p. 1127.) In *St. Paul Mercury*, the plaintiff's allegation that a particular paragraph of a lease set forth the indemnity agreement between the parties constituted a judicial admission that it was the applicable indemnity agreement. (*St. Paul Mercury*, *supra*, at p. 1248.) The court did not hold the allegation was an admission regarding the interpretation of the contract. Similarly, Thread's allegation operates only to admit the term was in the contract.

Pixior also contends the increased rates damages were unfounded because the operative complaint does not allege Pixior breached the contract by charging per cubic foot. Pixior's argument comes too late. The parties presented evidence at trial regarding the ambiguity in the contract—without objection that such testimony should not be permitted in light of the complaint's allegations. The jury then adopted Thread's view of the agreement's meaning. Waiting to contest the complaint's framing of the issues for trial until after the jury's verdict is a tactic that cannot succeed.[12] (*Martin v. Henderson* (1954) 124 Cal.App.2d 602, 607 [variance between pleadings and proof "may be disregarded where the action has been as fully and fairly tried on the merits as though the variance had not existed"]; see *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1237,

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[12] Though Pixior briefly asserts it took discovery and prepared for trial with the understanding that the contract was charging per cubic foot, it does not point to any evidence in the record demonstrating it was unprepared to address Thread's position at trial, or that Thread's position was somehow a surprise. The trial court also noted in its order on the motion for new trial that pleadings are subject to amendment to conform to proof. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 527 [amendments to conform to proof should be "'liberally granted'"].) While Pixior argues there was no guarantee an amendment would have been permitted, the trial court's reliance on this principle in its order suffices to establish the absence of prejudice here. (*Lewis v. Hankins* (1989) 214 Cal.App.3d 195, 202 [variance between pleading and proof "must [be] deemed harmless" where the complaint could be amended on reversal, objectionable evidence would be proper on retrial, and same judgment would be rendered].)

fn. 12 [absence of factual allegations in complaint supporting theory of recovery was not fatal to plaintiffs' assertion of the same at trial].)

Finally, Pixior argues substantial evidence does not support the remaining increased rates awards. Based on our review of the record before us,[13] substantial evidence supports the increased rates damages based on Thread's overpayments to Santa Fe. Metaxes testified she paid $158,000 more to Santa Fe through October 2016 than she would have under the per box In/Out services rate with Pixior. That alone is sufficient evidence under established law. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134 ["the testimony of a single witness, even the party [it]self, may be sufficient" to constitute substantial evidence]; see also Evid. Code, § 411 ["the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) Further, and contrary to Pixior's contention, Thread did not need to provide the jury with the specific components it used to compute its damages. It only

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[13] We do not have the entire trial record before us. Pixior, as the appellant, bears the burden of providing an adequate record that affirmatively demonstrates error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Pixior submitted reporter's transcripts of the pertinent proceedings and designated an appendix under rule 8.124 of the California Rules of Court. Though the record appears to include transcripts of the entire trial, it does not include all of the exhibits admitted at trial. The minute orders from the trial indicate approximately 145 exhibits were admitted. The record on appeal contains only the trial exhibits that were submitted in conjunction with the motions for new trial and for judgment notwithstanding the verdict (approximately 39).

needed to provide evidence of the amount of damages. "The absence of . . . documentation goes to the weight of the evidence and the credibility of the witness. Those determinations are for the [fact finder]." (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768.)

The record regarding the amount requested and awarded for increased rates based on Pixior's In/Out services is less robust. The primary evidence in the appellate record regarding this subcategory of damages is Metaxes's testimony that Thread paid $156,000 more over the course of its relationship with Pixior because Pixior charged it per cubic foot rather than per box. That suffices to demonstrate Thread suffered at least $156,000 in damages, and even if we further infer the jury awarded the higher amount Thread requested in closing argument ($158,316.71) given the to-the-penny correlation between the two figures, it is still Pixior's burden to affirmatively demonstrate error. As already noted, Pixior failed to include all the admitted trial exhibits in its appendix, and in the absence of a full record, we will not conclude Pixior has discharged its burden to show the award is lacking in substantial evidence.

2. The grant of the new trial motion as to warehouse lien damages

If a motion for new trial is granted, we apply a "highly deferential standard" to our review, upholding all factual determinations with "the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Lane*, *supra*, 22 Cal.4th at pp. 409-416.) "Indeed, an order granting a new trial "'*must* be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found

for the movant on [the trial court's] theory.'" [Citation.]" (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 146.)

Thread concedes the trial court was justified in finding the jury "should have fixed a somewhat lower figure for contract damages flowing from the warehouse lien." The concession is well taken. At the very least, the portion of warehouse lien damages attributable to the final amount charged for In/Out services fees, which Pixior increased by charging per cubic foot, was excessive because Pixior would have at least been entitled to the $0.54 per box the jury determined was the contracted rate. Thread goes on to argue, however, that this justifies a new trial only if the "sole basis for the damages was breach of contract," and contends instead that the entire award of warehouse lien damages is supported by the jury's finding of breach of the covenant of good faith and fair dealing.

"'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.' (Rest.2d Contracts, § 205.) This duty has been recognized in the majority of American jurisdictions, the Restatement, and the Uniform Commercial Code. [Citation.] Because the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684.) Thread has not identified any damages it suffered as a result of the breach of the covenant of good faith and fair dealing that are different from the damages it suffered as a result of the breach of contract. Since compensation for breach of the covenant is generally limited to contract remedies, the trial court did not err in concluding a new trial on warehouse lien damages was required.

3. The denial of the new trial motion as to "freight" and "additional overcharges" damages

The jury awarded Thread $265,196.35 in overcharges damages, $170,008.35 of which was attributable to the warehouse lien. As described by Thread in closing argument, the remaining $95,188 was divided into two sums: $15,000 was attributable to "Additional Overcharges" and $80,188 was attributable to "Freight from Universal to Pixior." Pixior contends no substantial evidence supports these awards and, thus, the trial court erred in not ordering retrial on these awards too.

There is substantial evidence supporting the freight damages. The evidence presented at trial established Pixior, through Burley, represented around the time of the execution of the contract that Pixior would pay the cost of "freight" to move Thread's merchandise from its former third-party logistics company to Pixior. A few days after the contract was signed, Burley wrote an email admitting he made the commitment but simultaneously stating Pixior expected Thread to reimburse it for the costs. The jury could reasonably have understood Pixior's about-face was a breach of the parties' agreement. Further, the record demonstrates the award of damages the jury made is sufficiently grounded in the evidence. Gheewala testified Thread paid $130,000 for the move, and Thread introduced evidence that summarized payments made by Thread to Pixior over the course of their business relationship, including eight line items described as either "MOVE LABOUR CHARGES + Overtime" or "MOVE Freight IN." Those payments total $72,880. Another line item charged in October 2015 describes a $16,400 payment

for "Charge back moving Trailers."[14] Combined, the evidence justified $89,280 in damages.

The record also contains sufficient evidence to support the portion of the award attributed to "additional overcharges," namely, Metaxes's testimony that Pixior charged Thread "$15,000" extra during the period after imposition of the warehouse lien. Although Pixior complains Thread did not provide any evidence demonstrating what the charges were for, or how Pixior breached the agreement by charging Thread for them, Metaxes testified the additional amount was extorted or additional, which adequately establishes they were unjustified. The lack of further specification goes to the weight of the evidence and the credibility of the witness. Those determinations were for the trial court in ruling on the new trial motion, and we will not disturb them on appeal.

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[14] Though this last line item is billed under the "Warehouse Lien Payment," we see no reason to conclude the jury could not have relied upon it in determining the appropriate amount of freight damages. Additionally, because we affirm the trial court's order granting a new trial on the warehouse lien damages, the resolution of this issue does not pose double counting problems.

DISPOSITION

The judgment is affirmed in part and reversed in part. The matter is remanded for a new trial on the issues of warehouse lien damages and increased rate storage damages only. Thread shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.